

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

**PCB No. 14-110
(Air Permit Appeal)**

NOTICE OF ELECTRONIC FILING

To: *Via Facsimile*
Katherine D. Hodge
Edward W. Dwyer
Matthew C. Read
Hodge Dwyer & Driver
3150 Roland Avenue
Springfield, IL 62705

Via Email
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on the 14th day of April, 2014, the Respondent's Response to KCBX Terminals Company's Motion to Supplement the Record was filed with the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and is hereby served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

By: 
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DATE: April 14, 2014

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
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Petitioner,)	
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v.)	PCB No. 14-110
)	(Air Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**RESPONDENT'S RESPONSE TO KCBX TERMINALS COMPANY'S MOTION TO
SUPPLEMENT THE RECORD**

Respondent, Illinois Environmental Protection Agency, for its Response to KCBX Terminals Company's Motion to Supplement the Record, hereby states as follows:¹

BACKGROUND

1. On July 23, 2013, KCBX Terminals Company ("KCBX") submitted a construction permit application to the Illinois Environmental Protection Agency (the "Illinois EPA") for approval to install ten conveyers, one box hopper and one stacker at its site located at 10730 South Burley Avenue, Chicago, Illinois ("South Site"). (Administrative Record at R000186, R000187.) In the July 23, 2013 construction permit application, KCBX referred the Illinois EPA to particular pages within an "initial application." (See, e.g., Administrative Record at R000196 (under Material Usage Information, it states "See Tables 5 & 6 in initial application"); R000198 (above Applicable Rules, it states "See Narrative, Section 1.0 in initial application")). Subject to the discussion in Paragraph 12.C. below, the pages within the initial application are located in the Administrative Record at R000205 – R000221.

¹ On April 11, 2014, KCBX filed its Motion for Leave to File Amendment to its Motion to Supplement the Record. The Illinois EPA reserves the right to file a separate response to that Motion for Leave.

2. On January 17, 2014, the Illinois EPA denied KCBX's July 23, 2013 construction permit application.

3. On February 21, 2014, KCBX filed its Petition for Review of the Illinois EPA's January 17, 2014 denial.²

4. On March 24, 2014, the Illinois EPA timely filed the Administrative Record in the above-captioned Permit Appeal.

5. On April 7, 2014, KCBX filed its Motion to Supplement the Record ("Motion to Supplement"). The Illinois EPA did not receive service of the Motion to Supplement until April 9, 2014, approximately 2 1/2 weeks after the Illinois EPA filed the Administrative Record.

9. On April 9, 10 and 11, 2014, KCBX took the depositions of Michael Dragovich, Robert Bernoteit, Raymond Pilapil and Joseph Kotas, each an employee of the Illinois EPA. The Illinois EPA took the deposition of Michael Estadt on April 14, 2014, and is scheduled to depose Terry Steinert and Dave Kolaz on April 15 - 16, 2014, respectively. KCBX has noticed the deposition of Julie Armitage on April 16, 2014.

ARGUMENT

11. In preparing the Administrative Record, the Illinois EPA was required to include "all documents on which the Agency relied or *reasonably* should have relied." 35 Ill. Adm. Code 105.212; *Ameren Energy Resources Generating Co. v. Illinois Env't'l Protection Agency*, PCB No. 14-41, 2014 WL 1218325 at *8 (March 20, 2014).

12. The Illinois EPA responds to the documents referenced in KCBX's Motion to Supplement as follows:

² KCBX has advised that it does not intend to waive the 120-day deadline for the Illinois Pollution Control Board (the "Board") to issue its decision in this Permit Appeal. 415 ILCS 5/40 (2012). Accordingly, on March 25, 2014, a Hearing Officer Order was entered scheduling the hearing in this matter on April 29, 2014, and ordering the close of discovery on or before April 18, 2014.

- A. **Petition Exhibit 2** – Federally Enforceable State Operating Permit (“FESOP”) issued to KCBX Terminal at 3259 East 100th Street, Chicago, Illinois 60617 (the “North Site”) on April 5, 2012.

Petition Exhibit 2 constitutes a FESOP issued to KCBX for the North Site. To date, no FESOP has been issued to KCBX for the South Site, and KCBX is not permitted to operate the North Site and the South Site as a single source. Because KCBX only referenced the existence of the FESOP for the North Site in the July 23, 2013 construction permit application in the context of KCBX’s intention to operate its sites as a “single source,” *see* R000186, the persons at the Illinois EPA who made the denial decision had no reason to consider any information in the FESOP and did not rely on such FESOP. Because the FESOP issued to KCBX for the North Site simply includes ten conveyers; one box hopper and one stacker in the list of equipment set forth on page 1, with no additional supporting information, the Illinois EPA should not have relied on such FESOP. KCBX’s request to include Petition Exhibit 2 in the Administrative Record should be denied.

- B. **Petition Exhibit 9** – December 20, 2012 Letter from Monica T. Rios to Lori Pennington

KCBX’s purchase of the South Site from DTE Chicago Fuels Terminal, LLC on December 20, 2012 is not at issue in this Permit Appeal. Similarly, the Joint Construction and Operating Permit issued to KCBX on December 18, 2012 is irrelevant. The “Construction Permit – NSPS and NESHAP Source – Revised” issued on April 18, 2013 was the construction permit in place at the time of KCBX’s submission of the July 23, 2013 construction permit application to the Illinois EPA. The April 18, 2013 construction permit is included in the Administrative Record. (*See* R000130-R000149.) The Illinois EPA did not rely, and reasonably should not have relied on, the December

20, 2012 Letter from Monica T. Rios to Lori Pennington, which is irrelevant to this Permit Appeal. KCBX's request to include Petition Exhibit 9 in the Administrative Record should be denied.

- C. **Petition Exhibit 10** –September 17, 2012 Construction Permit Application for DTE Chicago Fuels Terminal, LLC and December 20, 2012 Letter from Katherine D. Hodge to Edwin C. Bakowski Enclosing Same.

In the July 23, 2013 construction permit application, KCBX referred the Illinois EPA to particular pages within an “initial application.” (*See, e.g.*, Administrative Record at R000196 (under Material Usage Information, it states “See Tables 5 & 6 in initial application”); R000198 (above Applicable Rules, it states “See Narrative, Section 1.0 in initial application”)). It is undisputed that the “initial application” is the September 17, 2012 Construction Permit Application. The Administrative Record includes Narrative, Section 1.0, a diagram, Tables 5 & 6 and Table 13. (*See* R000205-R000221.) In preparing for depositions, counsel for the Illinois EPA noted that the Administrative Record at page R000202 references “Tables 1-12 in initial application” in small print at the top of the page. As such, the Illinois EPA does not object to the inclusion of Tables 1-4 and 7-12 in the Administrative Record. The Illinois EPA objects to the inclusion of any additional pages from Petition Exhibit 10, as KCBX did not reference those pages within its July 23, 2013 construction permit application. To include the additional pages would permit KCBX to supplement its construction permit application after the conclusion of the statutory review period. Except for Tables 1-4 and 7-12, KCBX's request to include Petition Exhibit 10 in the Administrative Record should be denied.

- D. **Petition Exhibit 11** – December 20, 2012 Letter from Edwin C. Bakowski to KCBX

KCBX's pending FESOP application with the Illinois EPA for the South Site is irrelevant to this Permit Appeal. The FESOP application for the South Site does not contain any information regarding the equipment from the North Site that KCBX is seeking to install at the South Site through the July 23, 2013 construction permit application. In addition, KCBX is required to comply with the terms of the most current permit issued by the Illinois EPA (in this case the April 18, 2013 construction permit which is already in the Administrative Record) as a matter of law, not because of Mr. Bakowski's December 20, 2012 letter. The Illinois EPA did not rely, and reasonably should not have relied, on the December 20, 2012 letter. KCBX's request to include Petition Exhibit 11 in the Administrative Record should be denied.

- E. **Petition Exhibit 12** – December 20, 2012 Letter from Edwin C. Bakowski to KCBX and Attached Construction Permit Issued to KCBX on December 20, 2012

As of July 23, 2013, the date of KCBX's submission of the permit application at issue in this Permit Appeal, KCBX was operating pursuant to the April 18, 2013 construction permit, not the December 20, 2012 construction permit. The December 20, 2012 construction permit for the South Site does not contain any information regarding the equipment from the North Site that KCBX is seeking to install at the South Site through the July 23, 2013 construction permit application. The fact that both the April 18, 2013 and December 20, 2012 construction permits had the "same construction permit number" is irrelevant. The April 18, 2013 construction permit is included in the Administrative Record. (See R000130-R000149.) The Illinois EPA did not rely, and reasonably should not have relied, on the December 20, 2012 construction permit or Mr.

Bakowski's December 20, 2012 letter. KCBX's request to include Petition Exhibit 12 in the Administrative Record should be denied.

F. **Petition Exhibit 13** – July 23, 2013 Request for Revision

KCBX acknowledges that the July 23, 2013 construction permit application is included in the Administrative Record at R000186-R000204. (Motion to Supplement at p. 5.) The Conveyer Transfer Points Process Flow Diagram is included in the Administrative Record at R000184 and R000212. To include another copy of the July 23, 2013 construction permit application and Conveyer Transfer Points Process Flow Diagram will simply cause confusion in the references to the bates-label numbers throughout the April 29, 2014 hearing and is unnecessary. KCBX's request to include Petition Exhibit 13 in the Administrative Record should be denied.

G. **Petition Exhibit 31** – November 1, 2013 e-mail from Katherine D. Hodge to Kathryn Pamerter, cc: to Chris Pressnall with revised Fugitive Particulate Operating Program attached

The November 1, 2013 e-mail from Katherine D. Hodge to Kathryn Pamerter was provided in conjunction with the enforcement action pending in the Circuit Court of Cook County, *People of the State of Illinois v. KCBX Terminals Company* (13CH24788). Notwithstanding, the Illinois EPA has no objection to including the November 1, 2013 e-mail in the Administrative Record. The Illinois EPA objects to the inclusion of another copy of the November 1, 2013 fugitive particulate matter operating program, which is located in the Administrative Record at R000150 – R000163. Except for the November 1, 2013 e-mail from Katherine D. Hodge to Kathryn Pamerter, KCBX's request to include Petition Exhibit 31 in the Administrative Record should be denied.

H. **Petition Exhibit 32** – Letter from Katherine D. Hodge to Kathryn A. Pamerter, cc: to Chris Pressnall dated November 15, 2013.

The November 15, 2013 letter from Katherine D. Hodge to Kathryn Pamerter was provided in conjunction with the enforcement action pending in the Circuit Court of Cook County, *People of the State of Illinois v. KCBX Terminals Company* (13CH24788). Notwithstanding, the Illinois EPA has no objection to including the November 15, 2013 letter in the Administrative Record.

I. January 13, 2014 Press Release from Illinois Governor's Office and Audio Clip Imbedded in January 13, 2014 Online Press Release

To date, KCBX has not authenticated the January 13, 2014 press release or the audio clip referenced in the Motion to Supplement. During depositions, KCBX learned that Robert Bernoteit and Raymond Pilapil had not seen the January 13, 2014 press release and did not ask questions regarding the audio clip. Presumably, KCBX will inquire whether Julie Armitage, the Chief of the Bureau of Air, has knowledge of the press release or the audio clip during her deposition on April 16, 2014. KCBX has been afforded the opportunity during the depositions, and will be able during the hearing, to ask questions regarding the information contained within the January 13, 2014 press clip and imbedded audio clip. The January 13, 2014 press clip and imbedded audio clip, themselves, do not constitute a written policy of the Illinois EPA. Because the Illinois EPA did not rely and reasonably should not have relied upon a January 13, 2014 press release from the Governor's Office or an audio clip imbedded therein, KCBX's request to include such document and audio file in the Administrative Record should be denied.

J. Documents of Conversations with Illinois Governor's Office

KCBX chose not to serve any written discovery on the Illinois EPA pursuant to the Board's procedural rules and the Illinois Supreme Court rules. Paragraph 13 of the

Motion to Supplement fails to comply with such discovery rules. KCBX has been afforded the opportunity during the depositions, and will be able during the hearing, to ask questions of Illinois EPA personnel regarding conversations, if any, with the Illinois Governor's Office. Such personnel include the two persons who made the decision to deny the July 23, 2013 construction permit application, Julie Armitage (the Chief of the Bureau of Air) and Robert Bernoteit. KCBX's request to include documents of conversations with the Illinois Governor's Office, if any, should be denied.

K. Deposition Rider Documents

Paragraphs 15 through 16 and 18 through 30 of the Motion to Supplement seek the inclusion of documents at issue in the Hearing Officer Order dated April 8, 2014 and the Interlocutory Appeal from Hearing Officer April 8, 2014 Order Denying Motion for Protective Order that was filed on April 14, 2014 ("Interlocutory Appeal"). Given the extreme time constraints in this Permit Appeal, the Illinois EPA incorporates by reference herein the argument included in its Interlocutory Appeal. KCBX's request to include in the Administrative Record the documents discussed in Paragraphs 15-16 and 18-30 of the Motion to Supplement should be denied.

L. Privilege Log Document P000002-P000023

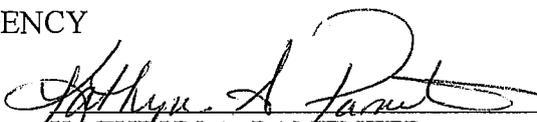
Paragraph 17 of the Motion to Supplement seeks inclusion of Privilege Log Document P000002-P000023 dated October 2, 2013 from Michael Dragovich to Robb Layman, an Illinois EPA attorney, which was cc:d to Mr. Brodsky and Mr. Bernoteit. The Illinois EPA incorporates by reference herein the argument included in its Interlocutory Appeal regarding the attorney-client privilege and the deliberative process privilege. Moreover, the January 17, 2014 Permit Denial letter governs this Permit

Appeal. KCBX's request to include Privilege Log Document P000002-P000023 in the Administrative Record should be denied.

Based upon the foregoing, the Illinois EPA respectfully requests that the Board deny KCBX's Motion to Supplement the Administrative Record (subject to the limited exceptions stated above) and grant such other relief as the Board deems proper.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

By:



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CERTIFICATE OF SERVICE

I, KATHRYN A. PAMENTER, an Assistant Attorney General, do certify that I caused to be served this 14th day of April, 2014, the attached Notice of Electronic Filing and Respondent's Response to Motion to Supplement the Record upon (a) Edward W. Dwyer, Katherine D. Hodge and Matthew C. Read *via facsimile* and (b) Bradley P. Halloran *via email*.


KATHRYN A. PAMENTER